Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.1282 OF 2008.

Md. Abdul Mannan and others

..... Plaintiff-Petitioners.

-VERSUS-

A.H.M. Saifullah and others

..... Defendant-Opposite parties

Mr. Faruk Ahmed, Senior Advocate with
Ms. Faruki Akther Prodhan, Advocates

.....For the petitioners

Mr. Md. Nawshad Jamil, Advocate with
Mr. Abdul Hamid Shah, Advocates

..... For the Opposite Parties.

Heard on 07.01.2025, 22.01.2025 and 27.01.2025

Judgment on 29.01.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 11.10.2007 passed by the learned Joint District Judge, 2nd Court, Rangpur in Other Appeal No. 101 of 2005, disallowing the appeal and affirming the Judgment and decree dated 31.08.2005 passed by the learned Senior Assistant Judge, Pirgacha in Other Suit No.13 of 1995 dismissing the suit should not be set aside and/or

pass such other or further order or orders as to this court may seem fit and proper.

Facts relevant for disposal of the Rule are that the petitioner as plaintiff filed Other Suit No. 13 of 1990 before the Senior Assistant Judge, Pirgacha, Rongpur, against the defendants for cancellation of a registered partition deed No.10491 dated 22.10.1994 alleged to have executed by the plaintiff in favor of his heirs contending inter alia that the plaintiff has got 10.21 acres of land out of which he sold 2.18 acres for his own necessities and after such sale he had only 8.02 acres of land. The plaintiff, an older man, decided to settle up his property amongst his heirs, and with the end in view, he went to the registry office on 22.10.1994 and executed and registered a partition deed. It is the further case of the plaintiff that out of 8.02 acres of land, he will retain 4.01 for himself and shall distribute 4.01 acres of land to his heirs, and for that purpose, the plaintiff authorized his two sons, Shahidullah and Shamuszzaman. Unfortunately, taking this opportunity, the aforesaid two sons of the plaintiff have included the entire 8.02 acres of land in the partition deed and collusively distributed the said 8.02 acres of land according to their sweet will, taking the major portion in their names, which was not according to the desire of the plaintiff. That the plaintiff was not aware of the same and for the first time on 10.11.1994, he came

to know about the same from his son, defendant No.3, and thereafter, on obtaining the certified copy of the deed, he came to know about the same and being aggrieved and dissatisfied with the said document he constrained to file this suit.

That the suit was contested by the defendant Nos.1, 2, 4, and 5 by filing joint written statements denying all the materials allegations made in the plaint contending inter alia that the plaintiff, being a significantly older man, decided to dispose of his properties amongst his heirs and as such on 03.10.1994 the plaintiff in the presence of local prudent expressed his desire and through his engaged deed writer wrote out the deed. The partition deed was written according to his passion, and he himself gave the necessary papers to the deed writer. The deed was read over to him, and he put his signature after reading the same, and one of his sons, Abdul Mannan, signed as an identifier. Abdul Mannan, dissatisfied with the partition deed, has managed the plaintiff to file this suit. The plaintiff, influenced by his son Abdul Mannan, has filed this suit with false and concocted stories, and thus, the suit is liable to be dismissed with cost.

The learned Senior Assistant Judge, Pirgacha, Rongpur, framed necessary issues to settle the dispute among the parties.

Subsequently, the learned Senior Assistant Judge, Pirgacha, Rongpur, dismissed the suit by the Judgment and decree dated 31.08.2005.

Being aggrieved by the above judgment, the plaintiff, as appellant, preferred Other Appeal No.101 of 2005 before the District Judge, Rangpur. Eventually, the learned Joint District Judge, 2nd Court, Rangpur, dismissed the appeal and thereby affirmed the Judgment and decree of the trial court by the Judgment and decree dated 11.10.2007.

Being aggrieved by the above judgment, the plaintiff-petitioner preferred this Civil Revision under Section 115(1) of the Code of Civil Procedure before this court and obtained the instant Rule.

Mr. Faruk Ahmed, the learned Senior Advocate appearing on behalf of the plaintiff-petitioners, submits that both the Courts below committed an error in the decision, occasioning failure of justice in not holding that the plaintiff had decided to distribute half of his property amongst his heirs proportionately and not by way of discrimination as it was done in the alleged deed.

Mr. Md. Nawshad Jamil, learned advocate appearing on behalf of the defendant-opposite parties, submits that both the Courts below, having considered all the material aspects of the case and discussing the evidence, rightly dismissed the suit and

hence the courts below did not commit any error of law resulting in an error in the decision occasioning failure of justice.

I have anxiously considered the submissions advanced by both parties, perused the Judgment and decree passed by both the courts below, as well as evidence of witnesses and other material evidence on record.

It manifests that the plaintiff filed the instant suit for cancellation of the partition deed with an allegation the plaintiff, an older man, decided to settle up his property amongst his heirs, and with the end in view, he went to the registry office on 22.10.1994 and executed and registered a partition deed. It is the further case of the plaintiff that out of 8.02 acres of land, he will retain 4.01 for himself and shall distribute 4.01 acres of land to his heirs, and for that purpose, the plaintiff authorized his two sons, Shahidullah and Shamuszzaman. Unfortunately, taking this opportunity, the aforesaid two sons of the plaintiff have included the entire 8.02 acres of land in the partition deed and collusively distributed the said 8.02 acres of land according to their sweet will, taking the significant portion in their names, which was not according to the desire of the plaintiff.

It manifests from the record that the plaintiffs' side, to prove their case, examined 4(four) witnesses and exhibited documents, i.e., Exhibit-1 deed No.10499 dated 22.10.1994, Exhibit-2, 2(ka)

and 2(kha) C.S. Khatian Nos. 213, 323 and 410, Exhibit-3, 3(ka)-3(ঞ) S.A. Khatian Nos.224, 225, 226, 227, 228, 229, 371, 372, 373, 462 and 485, Exhibit-4 deed No.5882 dated 25.06.1998, Exhibit-5 deed No.981 dated 28.01.1998. To prove their case, the defendant examined 3(three) witnesses, but the defendant submitted no documentary evidence.

I have scrutinized each deposition, cross-examination of witnesses, and documentary evidence. It appears from exhibit-1 the partition deed in question that one Abdul Mannan, son of the plaintiff, was an identifier of the deed who, in his evidence, as P.W.1, admitted that he identified the plaintiff-vendor and his signature on the deed. Moreover, he was present at the time of registration of the alleged deed and put his signature thereon. This indicates that the plaintiff went to the concerned sub-registrar office and put his signatures and thumb impression to register the partition deed.

It appears that the trial Court, while dismissing the suit, says that:-

> "আঃ মান্নান ও আরো ৩ জন বিবাদী বাদীর শ্রণীভূক্ত নয়। আঃ মান্নান বাদী মোঃ সাইদুল হক পক্ষে সাক্ষ্য প্রদান করিয়াছেন। তিনি ২২-১০-৯৪ইং তারিখের বন্টননামা দলিলে বাদীকে সনাক্ত করিয়াছেন এবং নালিশী দলিলে তাহার স্বাক্ষর রহিয়াছে যাহা আঃ মান্নান পি.ডব্লিউ-১ হিসাবে সাক্ষ্য প্রদান কালে জেরার জবাবে স্বীকার করিয়াছেন দেখা যায়। এতদমর্মে পি.ডব্লিউ-১ আঃ মান্নানের জেরার বক্তব্য এই যে, "নালিশী দলিলে গ্রহীতা হিসাবে আমাদের বাদীদের নাম আছে এবং আমরা বাদীগণ ও নালিশী

দলিল মূলে জমি প্রাপ্ত হইয়াছি। নালিশী দলিলটি একটি বন্টননামা দলিল। বন্টননামায় আমাদের বাদীদের সই স্বাক্ষর আছে। নালিশী দলিলে আমার সই আছে।" কাজেই বাদী মোঃ সাইদুল হকের পক্ষে তাহার বক্তব্যকে বিশ্বাস করা যায় না। কেননা আঃ মান্নান স্বয়ং নালিশী দলিলে সনাক্তকারী হিসাবে স্বাক্ষর করিয়াছেন, কাজেই দলিলের মর্ম বা বিষয়বস্তু দলিল সম্পাদনের সময় হইতেই তিনি অবগত হইতেছেন। এক্ষনে তিনি উক্ত জমি দলিল আইনতঃ অস্বীকার করিতে পারেন না। বাদীপক্ষের অপরাপর সাক্ষীনগণ দলিল তঞ্চকতার বিষয়ে কোন সাক্ষ্য দেন নাই। অন্যদিকে বিবাদীপক্ষ তাহাদের সাক্ষ্যদ্বারা বাদী মোঃ সাইদুল হকের বন্টননামা দলিল কার্য্যকর হইয়াছে এবং তার জীবমান হইতে তাহার ওয়ারীশ পুত্র, কন্যা, স্ত্রী দলিলের জমি ভোগ দখল করিয়া আসিতেছে তাহা প্রমান হইয়াছে প্রতীয়মান হয়। এমতাবস্থায় নথী ও সাক্ষ্য পর্যালোচনায় এবং উপরোক্ত আলোচনার আলোকে আদালতের নিকট প্রতীয়মান হয় বাদী মোঃ সাইদুল হকের প্রদত্ত ২২-১০-৯৪ইং তারিখের ১০৪৯৯ নং বন্টননামা দলিলটি টি.পি. এ্যাক্ট এর বিধান মোতাবেক ও রেজিষ্ট্রেশন এ্যাক্ট এর বিধান মোতাবেক সুষ্ঠভাবে সম্পন্ন হইয়াছে এবং দলিলটি ইতিমধ্যে কার্যকর (acted upon) হইয়াছে। সুতরাং নালিশী দলিলটিকে বে-আইনী, বেদ্বারা, তঞ্চকী, যোগসাজসী ও বাতিলযোগ্য গণ্য করা যাইতেছে না।"

Considering the above, the alleged partition deed appears to have been registered per the provision enumerated in Section 60 of the Registration Act. So, it is a strong presumption that the alleged deed is a genuine instrument. This view gets support from the case of Kazi Rafiqul Islam Vs. Kazi Zahirul Islam reported in 70 DLR(AD)135 wherein their Lordship of the Appellate Division held that:-

> "If the question is whether the deed is genuine or not, the simple answer is, it being a registered document, is showered with a strong presumption as to genuineness. Sections 59, 79, and 144 of the Evidence

> Act also lend support to section 60 of the Registration Act on this score. No doubt, this presumption is rebuttable, which connotes that presumption raised by the admitted fact of registration could be rebutted by adducing counter availing evidence, showing that notwithstanding the fact of registration, the executant did not really affix his signature or thumb impression voluntarily which in the given circumstances, could be done by adducing expert evidence as to the physical and/or mental incapacity of the executant".

Notably, it is the further case of the plaintiff that out of 8.02 acres of land, he will retain 4.01 for himself and shall distribute 4.01 acres of land to his heirs, and for that purpose, the plaintiff authorized his two sons, Shahidullah and Shamuszzaman. Unfortunately, taking this opportunity, the aforesaid two sons of the plaintiff have included the entire 8.02 acres of land in the partition deed and collusively distributed the said 8.02 acres of land according to their sweet. In this regard P.W.1 though claimed the above in his deposition, but none of the witnesses corroborated his evidence. Moreover, P.W. 1 admitted in the cross-examination that the plaintiffs' names are in the alleged deed, and they also got property by dint of the deed. They put their signature in the deed, and 8.03 acres of land are in it.

It appears that the appellate court, while affirming the findings of the trial court below, says that:-

"কাজেই, বাদী ও বিবাদীপক্ষের সাক্ষীদের সাক্ষ্য প্রমানাদি বিচার বিশ্লেষন করিয়া আদালতের নিকট প্রতীয়মান হয় যে, গত ২২/১০/৯৪ তারিখে নালিশী দলিল সম্পাদন ও রেজি: কালে মৃত সাইদুল হকের সকল ওয়ারিশ সাব-রেজি: অফিসে উপস্থিত ছিলেন এবং সাইদুল হকের মৃত্যু হলে তাহার ওয়ারিশ হিসাবে বর্তমান বাদীগন নালিশী বন্টননামা দলিল ও স্বাক্ষর প্রদান করিয়াছেন। অর্থাৎ বর্তমান বাদীগন নালিশী দলিল বিষয়ে বরাবর অবগত ছিলেন মর্মে সাক্ষ্য দ্বারা প্রতীয়মান হয়। বাদীপক্ষের ১ নং সাক্ষী মৃত সাইদুল হকের পুত্র আঃ মান্নান যিনি নালিশী দলিল সনাক্তকারী হিসাবে তিনি তাহার সাক্ষ্যে স্বীকারকরেন যে, বাদীগন সকলেই সাবরেজিঃ অফিসে উপস্থিত ছিলেন এবং বন্টননামা দলিলে স্বাক্ষর প্রদান করিয়াছেন এবং বাদীগন সকলেই বন্টননামা দলিলমূলে নিজ নিজ প্রাপ্ত জমি দখল ভোগ করিতেছেন। অর্থাৎ পি.ডব্লিউ-১ এর স্বীকৃতমতে সাইদুল হক এর স্ত্রী, পুত্র ও কন্যা সকলের উপস্থিতিতে সকল জ্ঞাতসারে স্বজ্ঞানে স্বইচ্ছায় নলিশীজমি সম্পাদন রেজিঃ করিয়াছেন মর্মে বিবাদীপক্ষের দাবী সাক্ষ্যপ্রমান দ্বারা প্রমানিত হইয়াছে।"

Further, it is the settled proposition of law that in a suit for cancellation of a deed/ setting aside a decree passed by a competent court, it is incumbent upon the plaintiff to prove by cogent evidence that the decree/deed was obtained by fraud practicing. This view gets support from the case of Jinnaqtunessa Vs. Bangladesh reported in 15 BLD (HCD) 104 where it has been held that:-

> *"It appears from the evidence of the lone witness who deposed in the said O.C. suit that he said nothing about obtaining the ex parte order in the Misc. Case No. 142 of 1970 by practicing any fraud upon the court or by any other fraudulent means. As such, I find substance in the above submission of the learned Advocate, Mr. Gour Gopal Shaha submits that in passing the ex-parte order in Suit No. 492 of 1981 the learned Munsif did not apply its judicial mind; the suit being a suit for cancellation of*

a decree it was incumbent upon the plaintiff to show that the decree was obtained by practicing fraud upon the Court no evidence to that effect being adduced by the plaintiff the learned Assistant Judge committed an error of law in decreeing the suit ex-parte. He also submits that it is the plaintiff who has to prove his case through his witness and papers. In support of his above contentions, he has rightly placed reliable upon the cases of Md. Naimuddin Sarder -Vs- Md. Abdul Kalam Biswas and another reported in 39 DLR (A.D) 237 and Bangladesh -Vs- Israil Ali and others reported in 1981 BLD (A.D.) 371. In the aforesaid two cases, their Lordships in the Appellate Division observed that the plaintiff in order to succeed must establish his own case and the weakness of the defendant's case is no ground for passing a decree in favor of the plaintiff."

In the instant case, it appears from the record the plaintiffs, by adducing and producing oral and documentary evidence, failed to prove that the defendants (sons of the plaintiff) have included the entire 8.02 acres of land instead of 4.01 acres of land in the alleged deed and collusively distributed the said 8.02 acres of land according to their wish fraudulently.

Mr. Ahmed, referring to Annexure-A to the Supplementary Affidavit, submits that the deed of partition in question is barred by res-judicata regarding the disputed land in the suit because the defendant Nos.1-2 at the present suit earlier filed Title Suit No. 41 of 1999 before senior Assistant Judge, Pirgacha, Rangpur

against Mohammad Abul Kalam Azad and some others and the plaintiff of Other Suit No. 41 of 1999 claim the title in the land in the suit based on the alleged deed of partition dated 22.10.1994. Subsequently, the learned Judge of the trial court dismissed the suit on a finding that the alleged deed of partition was not acted upon.

It manifests from the record that the plaintiff did not raise any such question in his plaint or his evidence nor raised any question in the court of the trial or the appeal below. So, it is hit by Order VI Rule 7 of the Code of Civil Procedure, which is a complete departure from the material facts, as stated in the plaint. Moreover, it is well settled that in the determination of the question of facts, parties should not be allowed to lead evidence without proper pleadings. This view gets support from the case of Bashant Protima Nandi Vs. The government of Bangladesh reported in 20 BLC (AD) 263 where their Lordships of the Appellate Division held that:-

> "From the impugned Judgment and order, it appears that the High Court Division without considering the case of the respective parties and discussing the evidence on record raised a new point that an issue as quoted hereinbefore need be framed and decided. But the contesting defendants did not raise any such question in their written statement nor did they raise any issue nor any point in the Courts below in that

regard. From the judgment of the trial Court, it also appears that issue No. 2 was framed to the effect "নালিশী ভূমিতে বাদীনির স্বত্ব স্বার্থ দখল আছে কি-না?"। We are of the view that this issue squarely covers the issue as suggested by the High Court Division. From the Judgment of the trial Court, it further appears that it decided issue No. 2 in favour of the plaintiff on detailed discussion of the evidence on record. However, the appellate court took a reverse view. Since the two Courts took two different views and the entire records were before the High Court Division, the learned Judge of the Single Bench was obliged to decide whether the appellate court was correct in reversing the Judgment and decree of the trial Court in view of the pleading of the respective party and the evidence adduced by them Instead, he sought to find out a new point and thus raise a new issue beyond the pleading of the defendants and that suo-motu too. It needs to be mentioned that in para 1 of the plaint, the plaintiff categorically stated that "নগেন্দ্র কুমার রক্ষিত নালিশী ভূমি সহ অপরাপর ভূমির স্বত্ব দখলে থাকা অবস্থায় মারা গেলে তাহা পুত্রবর্তী কন্যা বাদীনি ওয়ারিশ সূত্রে প্রাপ্ত হন।" The defendants in para 10 of their written statement just gave a general denial of the statements made in the plaint as a whole. Then in para 11 under the head, actual facts the defendants did neither deny the assertion of the plaintiff made in para 1 of the plaint nor said that the plaintiff was not the daughter of Nagendra.

In exercising jurisdiction under section 115(1) of the Code of Civil procedure, the revisional court is not at

all permitted to raise a new point which fundamentally related determination of facts."

In view of the above, I do not find any substance in the submission of Mr Ahmed,

Considering the above facts and circumstances and relying upon the decision mentioned above, it appears that the appellate court and the trial court below correctly and justifiedly affirmed the Judgment of the trial court below. Consequently, it seems to me that the Judgment of the appellate Court below does not suffer from any legal infirmity, so the impugned Judgment is well founded in accordance with law and based on the materials on records, which cannot be interfered with by this court exercising revisional power under Section 115 (1) of the code.

Considering the above facts and circumstances and relying upon the decision mentioned above, it appears that the appellate court and the trial court, considering oral and documentary evidence, rightly dismissed the suit. Consequently, it appears that the Rule has no merit.

Resultantly, the Rule is discharged with cost.

The impugned Judgment and decree dated 11.10.2007 passed by the learned Joint District Judge, 2nd Court, Rangpur in Other Appeal No. 101 of 2005, disallowing the appeal and affirming the Judgment and decree dated 31.08.2005 passed by

the learned Senior Assistant Judge, Pirgacha in Other Suit No.13 of 1995 is hereby affirmed.

Communicate the Judgment and send down Lower Court Records at once.

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(Md. Salim, J).

Kabir/bo